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No. 01-900

In the Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CITIZENS EQUAL RIGHTS FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit held that Congress granted to the Hoopa Valley Indian Tribe regulatory jurisdiction over fee simple property belonging to non-members (including non-Indians) when it enacted the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i7.

1. When delegating regulatory jurisdiction over non-member owned fee simple property to an Indian tribe, must Congress describe that delegation in express and unambiguous language that refers to non-member owned fee simple property?

2. Does Congress have the authority to delegate regulatory jurisdiction over fee simple property belonging to a non-member to the Hoopa Valley Indian Tribe?

3. Does the delegation of broad legislative authority to the Hoopa Valley Tribe sanctioned by the Ninth Circuit violate the constitutional rights of non-members?

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
TABLE OF CONTENTS		ii
TABLE OF AUTHORITIES		iv
INTEREST OF AMICUS CURIAE		1
SUMMARY OF THE ARGUMENT		2
ARGUMENT		4
I.	BECAUSE OF THE IMPACT ON NON-MEMBER PROPERTY RIGHTS, CONGRESSIONAL DELEGATION OF AUTHORITY TO A TRIBE MUST BE EXPRESS AND UNAMBIGUOUS.	4
II.	CONGRESS DID NOT MAKE AN EXPRESS DELEGATION TO THE HOOPA VALLEY TRIBE OF REGULATORY POWER OVER NON-MEMBER FEE LAND.	11
III.	ANY DELEGATION OF REGULATORY AUTHORITY TO A TRIBE MUST BE BOTH EXPRESS AND NARROWLY GRANTED TO AVOID EXCEEDING CONGRESSIONAL POWER AND VIOLATING THE CONSTITUTIONAL RIGHTS OF NON-MEMBERS.	14

TABLE OF CONTENTS

CONCLUSION 20

TABLE OF AUTHORITIES

CASES	Page
Atkinson Trading Company, Inc. v. Shirley, 532 U.S. 645, 121 S.Ct. 1825 (2001)	3, 4, 7, 8, 12
Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989)	7, 13
Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001)	2-4, 7, 11-15, 18, 19
Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)	10
County of Yakima v. Confederated Tribes and Bands Of Yakima Nation, 502 U.S. 251 (1992)	9, 10, 19
Duro v. Reina, 495 U.S. 676 (1990)	7
Idaho v. United States, 533 U.S. 262 (2001)	14
J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)	18
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)	19
Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (C.A. Fed. 1994)	5

TABLE OF AUTHORITIES

CASES CONT.: Page

Mistretta v. United States, 488 U.S. 361 (1989) 18

Montana v. United States,
450 U.S. 544 (1981) 3, 6, 8, 11, 12, 15

Nevada v. Hicks,
533 U.S. 353, 121 S.Ct. 2304 (2001) 2, 6, 10, 13, 15, 16

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 3, 17

Panama Refining Co. v. Ryan, 293 U.S. 388, 464 (1935) 18

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 16

Solem v. Bartlett, 465 U.S. 463 (1984) 4, 7

South Dakota v. Bourland, 508 U.S. 679 (1993) 2, 3, 12, 15

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 3, 12

Touby v. United States, 500 U.S. 160 (1991) 18

United States v. Mazurie, 419 U.S. 544 (1975) 3, 13-15, 17, 18

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) 10

Worcester v. Georgia, 6 Pet. 515 (1832) 10

TABLE OF AUTHORITIES

CASES CONT.:	Page
Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), *cert. denied* 120 S.Ct. 2717 (2000)	4, 7, 19
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	16, 17
STATUTES	
18 U.S.C. §1151	7
18 U.S.C. §1161	13
Dawes Act, 24 Stat. 390	8
Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-7	3
Idaho Statehood Act of July 3, 1890, ch. 656, 26 Stat. 215	14
Indian Civil Rights Act of 1968, 25 U.S.C. §1302	15, 16
Indian General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. §331, *et seq.*	8
Indian Reorganization Act of 1934, 48 Stat. 984	10

TABLE OF AUTHORITIES

MISCELLANEOUS Page

Henry Dawes, "Proceedings of the Fifth Annual Meeting of the Lake Mohonk Conference of the Friends of the Indians," 1887, quoted in *Americanizing the American Indians* (Francis Paul Prucha ed., Lincoln: University of Nebraska Press, 1978) 9

Declaration of Independence, ¶2 17

Hamilton or Madison, *The Federalist* No. 54. Robert M. Hutchins ed., 1952 5

Walter Lippmann, *The Method of Freedom* (1934) 5

Report of the Commissioner of Indian Affairs, September 21, 1887 9

John R. Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development and Interpretation* (Henry St. George Tucker ed., Fred B. Rothman & Co. 2000) (1899) 16

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, §1 20

U.S. Const., Art. I, §8(3) (Indian Commerce Clause) 13

U.S. Const., Art. IV, §2 18

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS CONT.	Page
U.S. Const., Art. IV, §4	18
Fifth Amendment to the United States Constitution	5
Fourteenth Amendment to the United States Constitution	5
Tenth Amendment to the United States Constitution	17

INTEREST OF AMICUS CURIAE

The Amicus Curiae,[1] Citizens Equal Rights Foundation ("CERF") is a South Dakota non-profit corporation with members from a dozen states and numerous Indian reservation areas. The Board of Directors of CERF has both tribal and non-tribal members. CERF was formed to protect and support the constitutional rights of all people, to educate the public about their constitutional rights, and to participate in legal actions that adversely impact the constitutional rights of citizens. CERF is particularly concerned that the Indians and non-Indians who reside within the boundaries of original reservations are denied the full protection of the United States Constitution when reservation residents are made subject to the regulatory and adjudicative authority of tribal government. CERF has a critical interest in this case because it has members who own residential, recreational and commercial land and businesses within the boundaries of various Indian reservations in the United States. The actions of tribal governments, whether through regulatory or adjudicative authority, have impacted and have the potential to impact the property rights and the civil rights of United States citizens who are not members of tribal governments.

All parties have consented by written stipulation to the filing of this Amicus Brief.

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[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, their members or its counsel have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The decision by the en banc panel of the Ninth Circuit Court of Appeals in Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) held that Congress, by ratifying and confirming the governing documents of the Hoopa Valley Tribe, delegated legislative jurisdiction to the Tribe over non-members and their fee land. Not only is this holding in violation of this Court's directive that any federal delegation of authority must be "express," South Dakota v. Bourland, 508 U.S. 679, 695 (1993) n. 15, but it is a broad delegation of legislative jurisdiction without standards and without constitutional protections.

CERF is gravely concerned that any Congressional affirmation of a tribe's constitution will now be viewed as a grant of federal legislative power to a tribe that will not only trump non-member property rights, but also pre-empt the state and local laws that until now have governed non-member fee lands within the boundaries of a reservation. Of even graver concern is the manner in which the Ninth Circuit disregarded the constitutional right of a non-member to be regulated only by a government in which a citizen can participate. While the Ninth Circuit found that Congress had delegated broad legislative authority over non-member fee lands to the Hoopa Valley Tribe, it did not require any principles to guide the application of delegated authority, nor did it mandate that the Hoopa Valley Tribe be subject to all the requirements of the United States Constitution in the exercise of that authority. For example, the Tribe was not required to allow non-members to participate in tribal government through suffrage and holding elective office. As Justice Souter's concurrence eloquently pointed out in Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 2323 (2001), constitutional guarantees do not have the same force and effect with regard to tribal government.

CERF respectfully requests that the Court review the Bugenig decision by the Ninth Circuit Court of Appeals. This Court should reverse, finding that Congress did not intend, by virtue of the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-7 ("Settlement Act"), to delegate to the Hoopa Valley Tribe jurisdiction over non-member fee land. If this Court should find an express delegation by Congress to the Hoopa Valley Tribe, it will be necessary to address complex and thorny issues as to the power, standards and conditions for such delegation. The Ninth Circuit's decision conflicts with numerous decisions of this Court requiring an "express" delegation of Congressional authority, Bourland and United States v. Mazurie, 419 U.S. 544 (1975), and further conflicts with what Congress intended when it "ratified and confirmed" the constitutions of states. Because the Constitution of the United States protects both the rights of its citizens and their property rights, this Court should hold that the "express" delegation doctrine of tribal jurisdiction over non-members must be as narrowly and carefully construed as the two exceptions to the main rule delineated in Montana v. United States, 450 U.S. 544 (1981). Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading Co. v. Shirley, 121 S.Ct. 1833.

The Ninth Circuit has also strayed from the fundamental principles articulated by this Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), Montana and Strate which hold that tribal jurisdiction over non-members and non-member fee land is presumptively not present, and the exceptions are extraordinary. Underlying this doctrine is the recognition that the exercise of regulatory and adjudicatory authority by tribal governments over non-members and their fee lands is contrary to the very principles of representative government.

Finally, the decision by the Ninth Circuit Court of Appeals conflicts, in a fundamental way, with this Court's and the Eighth Circuit's decisions regarding the territorial extent of tribal jurisdiction. Put simply, tribal "territory" is not all lands within the boundaries of a reservation, only tribal lands, and it is this territorial restriction that severely limits tribal jurisdiction over non-member fee lands. Atkinson, 121 S.Ct. at 1832, 1833 [a "territorial restriction on tribal power" from their "dependent status" bars jurisdiction over "non-Indian fee land."] *See*, Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1022 (8th Cir. 1999), *cert. denied* 120 S.Ct. 2717 (2000) *citing* Solem v. Bartlett, 465 U.S. 463 (1984) [Lands to which the Indians did not have any property rights were never considered Indian country.]

Bugenig, by looking at the percentage of non-member fee land ownership as a factor to be considered in determining the delegation of federal jurisdiction to the Hoopa Valley Tribe to regulate non-member fee land, simply ignores this Court's express rejection of that approach in Atkinson. "Irrespective of the percentage of non-Indian fee land within a reservation" the exceptions to tribal jurisdiction are narrowly construed. Id., 121 S.Ct. 1834-35.

ARGUMENT

I. BECAUSE OF THE IMPACT ON NON-MEMBER PROPERTY RIGHTS, CONGRESSIONAL DELEGATION OF AUTHORITY TO A TRIBE MUST BE EXPRESS AND UNAMBIGUOUS.

> Government is instituted no less for protection of the property, than of persons, of individuals. The one as well as the other, therefore, may be considered as

> represented by those who are charged with the government. . .
>
> The rights of property are committed into the same hands with personal rights.

The Federalist No. 54 (Hamilton or Madison) (Robert M. Hutchins ed., pp. 170-172).

The founders of the American republic recognized that to secure freedom, the Constitution must protect both the civil rights and the property rights of citizens. This judgment stemmed not from the base motive of protecting the wealth of its authors, but rather from the fundamental recognition that the protection of property rights was necessary to secure the rights of freedom. Walter Lippmann articulated this doctrine:

> [T]he only dependable foundation of personal liberty is the personal economic security of private property.
>
> The teaching of history is very certain on this point. It was in the medieval doctrine that to kings belong authority, but to private persons, property, that the way was discovered to limit the authority of the king and to promote the liberties of the subject. Private property was the original source of freedom. It is still its main bulwark.

Walter Lippmann, *The Method of Freedom*, pp. 100-101 (1934), *cited in* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1175, n. 8 (C.A. Fed. 1994).

Because private property is the foundation of American freedom, it is anathema to the principles that underlie the Constitution to subject non-member fee lands to jurisdiction by a tribal government in which the non-member owner cannot participate. The Fifth Amendment to the

United States Constitution requires due process of law before property rights can be taken. The Fourteenth Amendment protects those rights against any state action that would deprive a person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. Allowing tribal governments to have broad powers over non-members violates these fundamental protections.

Accordingly, this Court has been increasingly protective of the rights of non-members, holding that non-member fee lands are not subject to tribal regulatory or adjudicative authority except in extremely limited circumstances:

> Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under Montana the extension of tribal civil authority over non-members on non-Indian land. (citations omitted).

Hicks, 121 S.Ct. at 2310. Amicus curiae submit that the same principles that led this Court to conclude that Montana's two exceptions are narrowly construed must also guide the analysis of whether Congress intended to make an **express** delegation of its authority to a tribe.

The Ninth Circuit's finding that Congress delegated authority to a tribe to regulate non-member fee lands runs counter to the Congressional policies that established non-member fee land ownership within reservations. Bugenig presumes that fee lands within a reservation are still part of a tribe's "territory." However, both the Eighth Circuit Court of Appeals and this Court have reached the opposite conclusion:

> At the turn of the century, Indian lands were defined to include "only those lands which the Indians held some form of property interest: trust lands, individual allotments, and to a more limited degree, opened lands that had not yet been claimed by non-Indians" Solem, 465 U.S. at 468. Lands to which the Indians did not have any property rights were never considered Indian Country.

Gaffey, 188 F.3d at 1022 [*citing* Solem].

The Ninth Circuit in Bugenig also found percentage of ownership to be a factor that the Court should consider in determining whether Congress had made an **express** delegation of authority to the Hoopa Valley Tribe. Id. 266 F.3d 1222. [*citing* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 441 (1989) (Stevens, J.) (plurality opinion).] In Atkinson, however, this Court rejected that interpretation. Id., 121 S. Ct. at 1834-35. Instead, Atkinson made very clear that when Congress conferred upon Indian tribes jurisdiction over certain criminal acts occurring in "Indian Country" in 18 U.S.C. §1151, that definition of "Indian Country" did not expand a tribe's sovereignty over non-members on non-Indian fee land. Atkinson, 121 S.Ct. 1832, n. 5.

> Only full territorial sovereigns enjoy the "power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," and Indian tribes "can no longer be described as sovereigns in this sense."

Id., *citing* Duro v. Reina, 495 U.S. 676, 685 (1990).

The Court went on to reiterate the purposes behind the Indian General Allotment Act as recognized by Montana:

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Atkinson, 121 S.Ct. 1830, n. 1, *citing* Montana, 450 U.S. at 560, n. 9.

The Court in Atkinson recognized that ninety million acres of non-Indian fee land had been acquired as part of the General Allotment Act [Dawes Act], 24 Stat. 388, as amended, 25 U.S.C. §331, et seq. Id. As to these non-Indian fee lands, the Congressional purpose was absolutely certain:

> The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large. . .Section 6 [of the Dawes Act specified] that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 24 Stat. 390. [With the passage of the Indian Reorganization Act] Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints upon the ability of Indian allottees to alienate or encumber their fee patented lands nor impaired the rights of those non-Indians who had

acquired title to over 2/3 of the Indian lands allotted under the Dawes Act.

County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 254-56 (1992).

The Report of the Commissioner of Indian Affairs, September 21, 1887, stated:

> After patents have been delivered, the laws of descent and partition of the State or territory in which the lands are located shall apply to said lands. . .
>
> After receiving his patent every allottee shall have the benefit of and be subject to the civil and criminal laws of the State or Territory in which he may reside; and no territory shall deny any Indian equal protection of law. (Id, at pages 3-4, *citing* Dawes Act.)

Henry Dawes himself made the following comment regarding the General Allotment Act:

> "I am responsible to the laws of Massachusetts alone; and so is each one of those Indians, henceforth, responsible alone to the laws of the state in which he lives." Henry Dawes, "Proceedings of the Fifth Annual Meeting of the Lake Mohonk Conference of the Friends of the Indians," 1887, quoted in *Americanizing the American Indians* (Francis Paul Prucha ed., Lincoln: University of Nebraska Press, 1978) p. 105.

Given the federal government's policies behind the General Allotment Act, non-Indians who purchase lands within former reservations had no expectation that tribal

governments would have any role in regulating their land or activities on fee land. *See generally*, Gaffey, 188 F.3d 1022. The settled expectations of all parties were that non-members and their fee lands would be subject to the state and local governments who would exercise regulatory and taxing authority, the very governments that both non-members and Indians participated in through election and by holding office. *See*, Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 107-08 (1998). As this Court stated in Hicks:

> State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the court departed from Chief Justice Marshall's view that the laws of [a state] can have no force within reservation boundaries. Worcester v. Georgia, 6 Pet. 515, 561 (1832), White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980). Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the state. Id. [citations omitted].

Under the General Allotment Act, the expectation was that even tribal members would be subject to state taxation and regulation for their activities on fee land owned by the tribal member on the original reservation. *See*, Cass County, *supra*. While Congress ended the allotment policy with the passage of the Indian Reorganization Act, 48 Stat. 984 (1934), Congress never sought to repudiate or undo the effects of the policy that had existed during those fifty years and which had so dramatically changed the nature of Indian reservation lands. *See*, County of Yakima, 502 U.S. at 254-56.

Given the firmly established Congressional policies that led to the creation of non-Indian owned fee lands within

reservations and settled expectations of all parties, this Court's precedents mandate that any delegation of authority to an Indian tribe to regulate non-Indian fee land must be **express**, i.e. absolutely unambiguous and certain as to Congressional intent. This strict requirement for finding an express delegation of authority is mandated by the same policy considerations that underlie the narrow reading this Court has required for the two exceptions to Montana's main rule.

II. CONGRESS DID NOT MAKE AN EXPRESS DELEGATION TO THE HOOPA VALLEY TRIBE OF REGULATORY POWER OVER NON-MEMBER FEE LAND.

The en banc panel of the Ninth Circuit found that Congress had delegated to the Hoopa Valley Tribe the power to regulate the conduct of non-Indians on non-Indian fee land based on this language in the Settlement Act:

> The existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are ratified and confirmed. Bugenig, 266 F.3d at 1207 (*citing* 25 U.S.C. §1300i-7).

The dispute leading the Settlement Act was a series of legal actions by the Hoopa Valley Tribe and the Yurok Indians. In order to resolve the disputes between these two different groups of Indians, Congress in the Settlement Act granted to the Hoopa Valley Tribe jurisdiction over the original portion of the reservation known as the Square, while the Yuroks were given jurisdictional power over the addition to the Square known as the Extension. Bugenig at 1207. The

Hoopa Valley Tribe had excluded the Yuroks from participating in its governing body, and from any benefit from sale of timber from the Square. Id. at 1206. It is not surprising, therefore, that Congress "ratified and confirmed" the governing documents of the Hoopa Valley Tribe and gave it jurisdiction over the Square to the exclusion of the Yuroks, just as Congress also gave the Yuroks control over the Extension to the exclusion of the Hoopas.

The Settlement Act is absolutely silent on any intent of Congress to deal with non-member fee lands in any manner, and there is no indication that Congress intended to delegate to the Hoopa Valley Tribe federal jurisdiction over non-member fee lands.

The evidence is quite to the contrary. For example, Congress provided that its partition of the reservation lands between the Hoopa and Yurok Indians was contingent upon the Hoopa Valley Tribe's adoption of a resolution (a) waiving any claim that the Tribe had against the United States from the Settlement Act and (b) consenting to the establishment of the Settlement Fund. Bugenig at 1207. To adopt the Ninth Circuit's reasoning, we must believe that Congress intended to grant authority to the Hoopa Valley Tribe to regulate non-member fee land only if the Hoopa Valley Tribe released any claims it had against the United States, i.e. that the United States traded its regulatory power over non-member fee land for the right not to be sued. Nothing in the Settlement Act bears out that remarkable position.

The Ninth Circuit en banc panel points to various expressions by the Supreme Court of the general proposition that Congress can delegate jurisdiction to an Indian tribe to regulate the conduct of non-Indians on non-Indian fee land that is within a reservation. Id. at 1210, *citing* Atkinson, 121 S.Ct. at 1830; Strate; South Dakota v. Bourland, 508 U.S. at

694-95 & n. 15; Brendale, 492 U.S. at 426; Montana, 450 U.S. at 564; and Mazurie, 419 U.S. at 553-54.

Despite the general proposition set forth in the above cases that Congress can make an **express** delegation of authority, only Mazurie concerns a delegation of authority that was upheld by this Court. Mazurie, however, dealt with a matter expressly within the provisions of the Indian Commerce Clause of the United States Constitution, Art. I, §8(3) since it concerned the sale of alcoholic beverages within the boundaries of a reservation that was directly impacting tribal members. Id. at 548, 557. Mazurie differs from this case in two important respects.

First, in Mazurie, the tribal ordinance required that every liquor store within the Wind River Reservation obtain a tribal liquor license. Id. at 548. A federal statute prohibited the introduction of alcoholic beverages into "Indian Country" as defined by 18 U.S.C. §1161 unless it was done in conformity with both state law and an ordinance adopted by the Tribe. Mazurie at 547. At issue in Mazurie was a federal statute that had a blanket prohibition on the sale of alcoholic beverages within Indian Country unless the Indian tribe created an exception. Put simply, this was a very narrow delegation of authority to an Indian tribe to create an exception to federal law, unlike Bugenig where the Ninth Circuit found a broad delegation of legislative authority to regulate non-member fee lands.

Second, in Mazurie the defendant was arrested and prosecuted by federal officers under federal law in federal district court, a far cry from the tribal processes in Bugenig which do not provide the same constitutional protections. *See*, Hicks, 121 S.Ct. at 2323 (J. Souter concurring).

Mazurie sanctioned as permissible only an extremely limited delegation of authority, and it relied upon well established Congressional power under the Indian Commerce

Clause to regulate alcohol sales in Indian Country. Id. at 554-55. The Ninth Circuit's reliance upon Mazurie as authority for a grant of broad legislative and adjudicative jurisdiction, which federalized the enactments of the Hoopa Valley Tribal Council, is without support in this Court's findings. Under the circumstances present in Bugenig, this Court should insist upon an **express** delegation of authority, in which Congressional intent is absolute and unqualified, before it finds that Congress intended such a result by "ratifying and confirming" the governing documents of the Hoopa Valley Tribe.[2]

III. ANY DELEGATION OF REGULATORY AUTHORITY TO AN INDIAN TRIBE MUST BE BOTH EXPRESS AND NARROWLY GRANTED TO AVOID EXCEEDING CONGRESSIONAL POWER AND VIOLATING THE CONSTITUTIONAL RIGHTS OF NON-MEMBERS.

The Ninth Circuit in Bugenig approved a delegation of general legislative authority over non-member fee lands, in which the limitation on the tribe's exercise of delegated

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[2] The concept that by ratifying and confirming the governing documents of the Hoopa Valley Tribe that Congress federalized all action taken by the Hoopa Valley Tribe under those documents is simply contrary to both Congressional intent and this Court's decisions. For example, while the Idaho Statehood Act, admitting Idaho into the Union, Act of July 3, 1890, ch. 656, 26 Stat. 215 "accepted, ratified and confirmed" the Idaho Constitution, this Court did not hold that Congress had delegated its authority to Idaho to legislate on behalf of Congress. *See*, Idaho v. United States, 533 U.S. 262, 334 (2001). If so, Idaho could have plenary jurisdiction over Indian tribes.

Congressional authority is not constrained by the Montana exceptions. Bugenig, 266 F.3d at 1223, n. 12. The Ninth Circuit found that although there are "limits on the authority of Congress to delegate its legislative power" those limits are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." Id. at 1222, *citing* Mazurie, 419 U.S. at 556-57. The problem with this analysis, of course, is that this Court has repeatedly stressed that Indian tribes lack independent authority over this particular subject matter, non-member fee lands. Bourland, 508 U.S. at 691, n. 11 and 695, n. 15 (the loss of power to exclude carries with it the loss of tribal regulatory authority; the source of tribal authority over non-members is not inherent, and cannot be inherent because of the dependent status of tribes); Hicks, 121 S.Ct. at 2310 (the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction.)

The Bugenig court further attempts to justify its decision, given the impact upon the constitutional rights of non-members who are excluded from participation in tribal government, because (1) of the existence of the Indian Civil Rights Act, 25 U.S.C. §1302, which applies some constitutional prohibitions to tribal government and (2) the tribal ordinance had to be approved by the Secretary of the Interior. Id. at 1223. Concerning the second point, having an ordinance approved by the Secretary of the Interior when that department is charged with the trust relationship that the United States government has with Indian tribes is not an independent forum for the vindication of non-members' constitutional rights. Furthermore, no "intelligible principles" guide the Department of Interior because the approval process by the Department is set forth in the Hoopa Valley Tribe's governings documents, not the Settlement Act. The Ninth Circuit bootstraps the executive branch approval

protection not from a Congressional scheme in the Settlement Act, but from the tribe's own documents. Id. at 1215.

With regard to the Indian Civil Rights Act, the only cause of action it provides (except for a habeas corpus action) is in tribal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). As Justice Souter pointed out in his concurring opinion to Nevada v. Hicks, tribes and tribal courts are not constrained in the application or interpretation of constitutional protections. *See,* Santa Clara Pueblo, 436 U.S. at 63 [Indian Civil Rights Act "does not prohibit the establishment of religion, nor . . . require jury trials in civil cases."] Since nothing in the Indian Civil Rights Act mandates such fundamental protections as separation of powers and the right to participate in representative government, non-member land owners are denied "the political franchise of voting" which is the "fundamental political right... preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). The Ninth Circuit's opinion is silent on this issue.

The essence of the American representative system of government is that the people of the United States are the sovereign, and the people have the power to create the Constitution that controls the sovereign powers and governmental powers delegated by the people to the federal government. *See,* John R. Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development and Interpretation* (Henry St. George Tucker ed., Fred B. Rothman & Co. 2000) (1899), vol. 1, p. 62. The doctrine was stated by Justice Matthews in Yick Wo as follows:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies

> of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

118 U.S. 356, 370 (1886).

The Declaration of Independence, ¶2, established the "self-evident" truth that the just powers of government over its citizens are derived only from the consent of the governed, a consent conditioned on the right of those citizens to participate in that government through the right of suffrage and holding elective office. The fundamental rights of United States citizens are violated when tribal governments can regulate the activities of non-members on their fee lands, but exclude those citizens from participating in tribal government.

To avoid these conflicts, this Court has carefully limited tribal governments to the exercise only of internal sovereignty powers. The ultimate sovereign, the people of the United States, cannot be made subject to regulation by tribal governments which do not, and cannot by their nature, provide non-members the fundamental rights guaranteed to the people of the United States by the United States Constitution. *Compare*, Oliphant, 435 U.S. at 210. This principle must be considered when determining whether Congress properly and expressly delegated regulatory authority to an Indian tribe over non-member fee lands. While it has "plenary" power over Indian tribes, Congress does not have plenary power over United States citizens. The entire structure of the United States Constitution, including the Tenth Amendment, makes this point quite clear.

Mazurie held that there are "limits" on the authority of Congress to delegate power to an Indian tribe. Id. at 556. No case, except Bugenig, stands for the proposition that Congress can delegate to an Indian tribe general legislative

authority over non-member fee lands. A permissible delegation must be express and accompanied by "intelligible principles" and a narrow grant of a specific power. Panama Refining Co. v. Ryan, 293 U.S. 388, 464 (1935) ["there are limits of delegation which there is no constitutional authority to transcend."] Mazurie contained a permissible delegation because Congress prohibited the sale of alcohol and allowed the tribe to create the exception. Bugenig's grant of broad legislative jurisdiction without principles to guide the exercise of the delegated power leaves the non-member landowner without a voice in government or an independent forum for redress. The guarantee in Article IV, §4 of the Constitution of a republican form of government in each state, and the guarantee in Article IV, §2 that the citizens of each state shall be entitled to all of the privileges and immunities of the citizens in the several states, would be denied those California citizens who resided upon fee lands in the Hoopa Valley Reservation.

When this Court has approved the delegation of Congressional authority, whether to an Indian tribe in Mazurie or to the agencies of federal government, the court did so in a context in which the basic regulatory framework was established by Congress. In Touby v. United States, 500 U.S. 160 (1991), for example, Congress established general criteria that prohibited the sale of controlled substances and allowed the Attorney General to add or remove substances from the schedule of controlled substances. This is very similar to the approved scheme of delegated authority to an Indian tribe in Mazurie. This Court's standards on delegation require that Congress set down an "intelligible principle" to which the agencies must conform. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) and Mistretta v. United States, 488 U.S. 361 (1989).

This Court struck down a delegation of authority under Massachusetts law that allowed churches to veto licenses for liquor stores within five hundred feet of their church in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). Larkin held that this delegated authority violated the Establishment Clause of the First Amendment. The Ninth Circuit in Bugenig nevertheless allowed for delegated authority in order to protect the "spiritual health of the tribe," Id. at 1222, without any "effective means of guaranteeing 'that the delegated power' will be used for secular, neutral, and nonideological purposes." Larkin at 125 [citation omitted].

The source of the Congressional authority allegedly delegated in Bugenig is weak at best, since the record establishes that Roberta Bugenig was not engaged in commerce with the Hoopa Valley Tribe, leaving only the geographical location of her land within the boundaries of a reservation as the source of Congressional power. Bugenig at 1218-22. Congress, through the General Allotment Act, intended to sever reservation fee lands from tribal jurisdiction and place those lands under the jurisdiction of state authority. County of Yakima, 502 U.S. at 254-56. Congressional authority is dependent upon either the treaty making power or Indian Commerce Clause. Since no treaty is involved, and no commerce is occurring between Roberta Bugenig and the Hoopa Valley Tribe, the jurisdiction of Congress is at best minimal. Accordingly, the source of the power delegated is insufficient to support the broad grant of general legislative jurisdiction to the Hoopa Valley Tribe.

Turning to state law, the Ninth Circuit finds no inconsistency in having both state law and federalized tribal law apply to fee lands on a reservation. The Ninth Circuit failed to complete that analysis and consider what occurs when there is a conflict between state law and federalized

tribal law. Because the Bugenig analysis holds that tribal ordinances are enacted pursuant to delegated federal authority, and have the force of federal law, presumably tribal ordinances would preempt inconsistent state laws. Federalized tribal law could command a non-member to do acts prohibited by state law. Since Article I, §1 of the Constitution vests "all legislative Powers" in the Congress of the United States, this delegation of general legislative authority to an Indian tribe turns federalism, including the Tenth Amendment, on its head.

Because of the myriad constitutional questions raised by the decision in Bugenig, this Court should reverse the Ninth Circuit's holding that there was an express delegation of authority by Congress in ratifying and confirming the governing documents of the Hoopa Valley Tribe.

CONCLUSION

The petition for writ of certiorari should be granted.

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